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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUL 21 2011 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a pulmonary and critical care physician. At the time he filed the petition, the petitioner was two years into a three-year fellowship at the [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement. The petitioner has indicated that his former attorney no longer represents him.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 23, 2009. In an accompanying letter, the petitioner's former attorney of record contended that the petitioner

> should not be required to go through the labor certification process, because this process is not able to take into consideration the unique skills that he has developed as a clinician

> and diagnostician, the tremendous national impact of the research work that is done, and the reputation that has sustained amongst him [*sic*] peers nationally.

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's initial submission included voluminous documentation of the petitioner's activities as a physician, including patient charts, case study presentations, and clinical study protocols for experimental drugs to treat chronic obstructive pulmonary disease (COPD). These materials establish that the petitioner has been active in treating patients and conducting medical research, but they do not, by themselves, distinguish the petitioner from other active physicians in his specialty. The studies all show sponsorship by various pharmaceutical companies, and the petitioner does not claim to have participated in the development of the drugs.

The petitioner stated:

> I perform many procedures: both invasive as well as non invasive. I have performed many more Bronchoscopies than my peers. I have performed over 120 Bronchoscopies every year while most pulmonary critical care fellows will perform about 50.
>
> Only **2%** of Pulmonary Fellowship programs in the country (out of 135) offer the subspecialty of Endobronchial ultrasound (EBUS). I would be considered an expert in this procedure.
>
> Only 22% of all the programs offer training in Percutaneous Tracheostomy – and only **8%** achieve that goal. I have done numerous Percutaneous Tracheostomies, and would be considered an expert in them, by my peers.
>
> I have expertise in managing both Neurocritical cases as well as Transplant critical care cases: Very few critical care physicians are trained in both or can offer expertise in both.

The petitioner provided no evidence to support his claim that few physicians share his ability to perform particular medical procedures. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Even then, the petitioner has not shown that individual patient treatment is national in scope. Published medical research has national scope, because publication disseminates the research

through the medical community, but the treatment of individual patients tends to be local in scope, largely because one physician can only treat so many patients.

When considering the petitioner's claims regarding his expertise in pulmonary and critical care medicine, the AAO notes that, while the beneficiary's medical education began in 1990, his own *curriculum vitae* indicates that his specialized training in pulmonary and critical care medicine began with a 2007-2010 fellowship at [redacted] which the petitioner had not yet completed when he filed the petition.

Several witness letters accompanied the petition. The petitioner's former attorney claimed that these letters were "from Independent Experts Nationwide," but all but one of the witnesses are on the faculty of medical schools where the petitioner has studied or trained. In all, the witnesses represent three Midwestern states. Like many of the attorney's (and witnesses') claims, the arbitrarily capitalized reference to "Independent Experts Nationwide" does not correspond to the evidence of record.

[redacted] stated:

> [The petitioner] has completed his training in Internal Medicine and is currently in training to be a specialist in pulmonary diseases. He is now completing his research training as part of this program under my direct supervision. . . .
>
> [The petitioner] has the potential to address a major current need in the United States. Not only is there an increasingly recognized shortage of specialists, particularly in the field of pulmonary and critical care medicine, but there is an even greater shortage of specialists with research expertise. . . . [The petitioner] is among the few who can help address this important need for our country. . . .
>
> [The petitioner] is working on a research project "effects of budesonide in formoterol on tissue repair and remodeling." . . . [The petitioner] has determined that novel mechanisms may account for therapeutic effects in cells that can mediate tissue repair. This has the potential to lead to new therapies for this condition.

[redacted] at [redacted] and director of its Pulmonary and Critical Care Medicine fellowship program, cited "a dire shortage of critical care physicians" and stated that his past and present appointments are prestigious honors. [redacted] also related an incident in which the petitioner diagnosed a dangerous medical condition and saved a patient's life.

[redacted] deemed the petitioner to be "an extraordinary leader at the top of the fields of pulmonology, critical care medicine, and sleep medicine," even though the petitioner had not yet completed his professional training in those specialties. [redacted] also cited "a critical shortage of physician-scientists in this country." With respect to the petitioner's research, [redacted]

[redacted] stated that the petitioner "and his team are now at the threshold of uncovering an alternate mechanism which may explain the steroid resistance in COPD."

[redacted] of the [redacted], where the petitioner studied from 2004 to 2007, stated that the petitioner "is one of a select group of extraordinary physician-scientists in the field" and "has truly achieved a level of recognition unlike any other physician-scientist in the United States." [redacted] stated that the petitioner has given

> numerous institutional presentations . . . to both junior and senior physicians to provide them with the most state-of-the-art techniques in pulmonology, critical care, and sleep medicine. . . . Junior physicians that [the petitioner] has taught will later go on to teach these techniques to their colleagues, thus creating a ripple effect. The widespread impact of [the petitioner's] teaching responsibilities truly distinguishes him as one of the foremost specialists in the United States today.

The petitioner does not claim to have developed or refined these "state-of-the-art techniques." An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 221 n.7. The basic argument appears to be that, having learned advanced procedures himself, the petitioner can now teach them to others. [redacted] did not explain how this distinguishes the petitioner from countless other medical students who, like the petitioner, take on some teaching duties even while completing their own professional training – let alone "truly distinguishes him as one of the foremost specialists in the United States today." Also, by [redacted]'s logic, the credit could just as easily go to the petitioner's teachers, or their teachers before them, as to the petitioner himself.

Because of the unsupported claims, the AAO simply cannot consider [redacted] exaggerated assertions to have significant evidentiary weight with respect to the petitioner's eligibility for the national interest waiver. The AAO notes that [redacted] medical specialty is nephrology; he claims no special expertise in pulmonology or critical care medicine.

A similar objection applies to the letter from [redacted]. She asserted that the petitioner is "a foremost expert in internal medicine, pulmonology, critical care medicine and neuro critical care," but her own medical background is in internal medicine and dentistry with no claimed expertise in pulmonology, critical care or neurocritical care. The overall tone of [redacted]'s letter is similar to most of the other witness letters: she described some of the petitioner's research work, discussed an example of the petitioner's skill as a clinical physician, and declared that only an elite few are capable of the achievements thus described. [redacted] echoed the claim that the petitioner's teaching duties create "a ripple effect."

The only witness with no direct connection to [redacted] or [redacted] is [redacted] of the [redacted] asserted that the petitioner "has reached a level of uncommon expertise in pulmonology and critical care medicine. He is a

physician-scientist of extraordinary ability who has risen to the top of his profession." It bears repeating that, when [redacted] wrote these words in May 2009, the petitioner was still, in [redacted] words, "in training to be a specialist in pulmonary diseases." It is very significant that [redacted] himself, the person closest to the petitioner's ongoing training, did not state or imply that the petitioner was among the nation's top pulmonologists. The claim that the petitioner had already reached the pinnacle of his specialty before he had even finished his training is dubious on its face. Absent objective evidentiary support, this claim does not become more credible simply by appearing in more than one witness letter. Instead, it leads to the inference that the witnesses were somehow coached as to what to say in their letters.

Another highly questionable claim in [redacted] letter is that "[t]o teach future doctors the procedures and techniques so important and vital to patient well being and care is an extraordinary honor given to only those physicians such as [the petitioner] at the very top of their fields." This claim borders on the absurd unless one adopts a very loose and generous definition of "the very top of their fields." Every medical school and teaching hospital is staffed with instructors who "teach future doctors the procedures and techniques so important and vital to patient well being and care." The AAO can give scant weight to claims (however repeated and however emphatic) that the petitioner is at the top of his field, if the top of the field is defined as any physician who teaches medical students.

The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as the AAO has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 165. USCIS need not accept conclusory assertions. *1756, Inc. v. Attorney General of the United States*, 745 F. Supp. 9, 15 (D.D.C. 1990).

The letters considered above are problematic for numerous reasons. Many witnesses claimed that the petitioner has already reached the top of his field, a sentiment conspicuously missing from the letters from the witnesses closest to his ongoing training. The remaining witnesses also failed to explain how it is the listed accomplishments make the petitioner one of the most celebrated physician-scientists in his specialty. The accomplishments – participating in clinical trials, treating patients, teaching students and so on – appear to be routine rather than hallmarks of rare achievement.

Numerous witnesses referred to a claimed (but not documented) shortage of critical care physicians. A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was

designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *See Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215, 218. There exists a statutory provision at section 203(b)(2)(B)(ii) of the Act granting the national interest waiver to certain physicians when the Department of Health and Human Services has officially designated a shortage area, but the petitioner has made no attempt to follow the provisions set forth in that subsection of the Act, or to conform to the corresponding regulatory requirements at 8 C.F.R. § 204.12.

In the case of physicians, section 203(b)(2)(B)(ii) of the Act provides for shortage-based waivers for physicians who meet certain conditions. The procedure to apply for the waiver in this way is set forth in the USCIS regulations at 8 C.F.R. § 204.12. The petitioner, however, has made no attempt to follow that procedure. The petitioner has simply asserted that there is (or eventually will be) a shortage of physicians in his specialty.

On February 3, 2010, the director issued a notice of intent to deny the petition and instructed the petitioner to submit verifiable documentary evidence to support claims of his impact and reputation in the fields of pulmonology and critical care medicine. In response, the petitioner argues persuasively that his medical research has both substantial intrinsic merit and (by virtue of publication) national scope. These factors establish the value of his occupation but do not distinguish him from others in that occupation.

In an effort to document a physician shortage in critical care medicine, the petitioner submitted a copy of "Critical Care Statistics in the United States," published in 2006 by the Society of Critical Care Medicine. This document stated that "the number of physicians entering critical care is growing," and instead blamed "a tremendous strain on critical care" on "the long-standing shortage of nurses, clinical pharmacists and respiratory therapists." Like so much else in the record, this document does not make the point it is intended to support.

The petitioner submitted copies of his articles, many of which predate his training in pulmonology and critical care medicine, and relate instead to other medical specialties. Printouts from Google Scholar (http://scholar.google.com) show six citations of one article from 2009 and eight citations of an article from 2007 (concerning a side effect of a psoriasis medication) that the petitioner wrote while studying at [redacted]. The petitioner documented additional citations of articles published while he was a researcher in India in 2000. Therefore, the petitioner documented only one cited article relating to his present specialty of pulmonology, which is significant considering the substantial emphasis that the petitioner and witnesses have placed on that specialty in this proceeding.

The petitioner submitted three further letters, all from witnesses at [redacted] or [redacted] [redacted] deemed the petitioner "one of the most exceptional and accomplished young physicians (internal medicine residents) I have met and trained. [redacted] described clinical trials in which the petitioner participated and noted that the petitioner won a commendation for volunteering in a [redacted] hospital "at great personal risk, when little was known about SARS." [redacted] repeated none of the hyperbolic claims about the petitioner's standing in his

profession, saying instead that the petitioner "is a gifted physician-scientist whose work in COPD has the potential to have a national impact over time."

Less restrained is [redacted] a fellow at [redacted] Division of Pulmonary, Critical Care, Sleep and Allergy Medicine, who claimed to "speak for colleagues around the country" in stating: "It is very well known within the scientific and medical community that the research work that [the petitioner] has performed in the last few years . . . has been amongst the most important to field of pulmonology, critical care and sleep medicine to date." The claim that the petitioner's reputation "is very well known" among unidentified "colleagues around the country" does not and cannot take the place of objective evidence to that effect.

[redacted] in his second letter on the petitioner's behalf, called the petitioner "one of the best minds in . . . COPD research" and described some of the clinical trials in which the petitioner has participated. The record does not indicate that the petitioner discovered, developed or improved any of the drugs in the clinical trials. Instead, the petitioner is one of several physicians administering the drugs to patients and observing the results, with funding supplied by the pharmaceutical companies.

The director denied the petition on April 14, 2010, stating: "The waiver must rest on the petitioner's individual achievements, rather than his general background or assertions regarding his promise or potential." The director found that "the record as a whole does not persuasively or consistently distinguish the petitioner from other physicians also performing valuable service at numerous institutions throughout the United States."

On appeal, the petitioner acknowledges that his "initial petition/evidence was far from organized. The Law firm that I had retained . . . uses a generic template for all its clients, with the lots of evidence presented in a way, more to confuse than to educate the reviewer and trading the quality of the evidence for quantity."

The petitioner states that his specialized training allows him to "offer the same services to the patient, that are [otherwise] offered only at tertiary centers." The value of his training is not in dispute, but this attests only to the substantial intrinsic merit of his occupation. It does not distinguish him from others in the same specialty.

The petitioner describes his ongoing research, including several clinical trials, and states that interaction with other researchers and physicians allows his findings to propagate throughout the field. This point addresses the national scope of his research work (if not his clinical practice), but again it does not facially distinguish the petitioner from other researchers. Similarly, the observation that the petitioner is both a physician and a researcher is not, on its face, automatic grounds for granting the waiver.

The petitioner rhetorically asks: "How do I prove that I am an above-average Pulmonary/critical physician?" and asserts that his "research work" and "specialized clinical skills . . . distinguish[] me

from my peers by a wide margin." Special or unusual knowledge or training, while perhaps attractive to a prospective United States employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 221.

The petitioner states: "I have to depend on the evaluations of my superiors and my prior achievements to prove to the USCIS that I am definitely an 'exceptional' physician." As explained elsewhere in this decision, meeting the regulatory definition of exceptional ability does not establish eligibility for the waiver. In terms of "the evaluations of . . . superiors," for reasons already explained, many of the witness letters contain claims that are simply too hyperbolic to be credible.

During this proceeding, the petitioner has asserted that the labor certification process would substantially delay his ability to immigrate to the United States and provide needed medical care. USCIS records show that [redacted] applied for a labor certification on the alien's behalf on December 10, 2010. The Department of Labor approved the labor certification so quickly that [redacted] was able to file an I-140 petition on the alien's behalf on January 25, 2011. The Director, Nebraska Service Center, approved the petition three days later. The alien appears simply to have assumed that there would be major processing delays, whereas the entire process, from filing the application for labor certification to approval of the petition, took only seven weeks. At this point, the petitioner seeks an exemption from a requirement that he has already met (through another proceeding).

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.